

GREENBERG TRAURIG, LLP  
 Ricky L. Shackelford (SBN 151262)  
*shackelfordr@gtlaw.com*  
 Matthew R. Gershman (SBN 253031)  
*gershmanm@gtlaw.com*  
 1840 Century Park East, Suite 1900  
 Los Angeles, CA 90067  
 Tel: (310) 586-7700  
 Fax: (310) 586-7800

COOLEY LLP  
 Michelle C. Doolin (SBN 179445)  
*mdoolin@cooley.com*  
 Darcie A. Tilly (SBN 239715)  
*dtilly@cooley.com*  
 4401 Eastgate Mall  
 San Diego, CA 92121  
 Tel: (858) 550-6000  
 Fax: (858) 550-6420

Attorneys for Defendant,  
 Fifth Generation, Inc.

[Additional Counsel Listed on Next Page]

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

GARY HOFMANN,  
 Plaintiff,  
 v.  
 FIFTH GENERATION, INC., a  
 Texas corporation; and DOES 1  
 through 100, inclusive,  
 Defendants.

AND RELATED CASE

Case No: 14-CV-2569 JM (JLB)  
 Related Case No: 14-CV-2990-JM (JLB)

**JOINT MOTION TO AMEND  
 SCHEDULING ORDER; MEMORANDUM  
 OF POINTS AND AUTHORITIES**

Action filed: Sept. 30, 2014  
 Removed: October 28, 2014  
 Trial date: October 31, 2016

CASE No.: 14-CV-2569 JM (JLB)

1 JOHN H. DONBOLI (SBN: 205218)  
2 E-mail: jdonboli@delmarlawgroup.com  
3 DEL MAR LAW GROUP, LLP  
4 12250 El Camino Real, Suite 120  
5 San Diego, CA 92130  
6 Telephone: (858) 793-6244  
7 Facsimile: (858) 793-6005

8 JONATHAN W. CUNEO  
9 Email: jonc@cuneolaw.com  
10 TAYLOR ASEN  
11 Email: tasen@cuneolaw.com  
12 CUNEO GILBERT & LaDUCA, LLP  
13 507 C Street, NE  
14 Washington, DC 20002  
15 Telephone: (202) 789-3960  
16 Facsimile: (202) 789-1813

17 *Attorneys for Plaintiff, Gary Hofmann*  
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1 **I. INTRODUCTION**

2 Defendant, Fifth Generation, Inc. (“Defendant”) and, Plaintiff Gary Hofmann  
3 (“Hofmann”) (Collectively “the parties), by and through their counsel of record, hereby  
4 jointly move the Court to amend its Scheduling Order issued by the Court on June 19,  
5 2015.

6 Following the June 19, 2015 Initial Status Conference, the parties have continued  
7 to meet and confer concerning the schedule for completing discovery necessary to  
8 present two early motions in the case, defendant’s summary judgment motion on the safe  
9 harbor issue and plaintiffs’ motion for class certification. As the parties set forth in their  
10 respective portions of the Joint Report, there was disagreement whether it was  
11 appropriate to litigate an early summary judgment motion. Now that the Court’s  
12 scheduling order has decided that issue, the parties have discussed some agreed  
13 modifications that, if adopted by the Court, will keep the case on an appropriate track  
14 towards disposition, but do so in a way that will streamline the process.

15 Specifically, the discovery necessary to present defendant’s safe harbor summary  
16 judgment motion is limited in scope, but also quite specific to the safe harbor issue, such  
17 that the discovery will have very little bearing upon plaintiffs’ required showings under  
18 Rule 23. As the Court has recognized, the decision on that summary judgment motion  
19 could prove to be dispositive. Under the current schedule, the parties would have to  
20 continue conducting discovery and briefing a class certification motion, which could  
21 include preliminary expert reports addressing consumer perception issues, as well as  
22 significant fact discovery from both the parties and third parties. None of these issues  
23 would be part of the safe harbor summary judgment motion. Moreover, it could all be  
24 for naught if the Court grants defendant’s motion. The parties believe, and jointly  
25 propose, to defer some of those activities and expense until after the summary judgment  
26 motion is decided.

1 In light of those issues, and with a mind to balancing the prompt disposition of the  
2 case with the cost efficient means of doing so, the parties jointly request that the Court  
3 modify its June 19, 2015 Scheduling Order in the following ways:

4 **A. Phasing of Discovery**

5 The parties propose that discovery prior to the filing of Defendant's safe harbor  
6 summary judgment be limited to the information the parties reasonably believe is  
7 necessary to bring or to respond to that motion. The discovery and motion cutoff dates  
8 for that summary judgment motion would remain unaffected.

9 The parties then propose that further discovery be stayed pending the Court's  
10 disposition of the safe harbor summary judgment motion. If the Court's ruling leaves  
11 issues to be litigated, then the case would proceed to litigation of class certification. The  
12 parties propose a period of six months for Plaintiffs to file their class certification motion  
13 and the parties to conduct that fact discovery.

14 **B. Phasing of Litigation**

15 The parties recognize that class certification is watershed development in a case,  
16 but it is not a dispositive ruling, although it is subject to appeal. Parties routinely  
17 postpone some discovery, and its attendant expense, until after a ruling on class  
18 certification. Simply put, some investments in expert reports that might be necessary to  
19 prosecute and defend a class action do not make sense in connection with litigating the  
20 claims of a few individuals. Having deadlines driven by the calendar rather than  
21 triggered by case-specific developments can be highly inefficient, because the parties are  
22 forced either to make those investments (and risk having them prove unnecessary), or to  
23 delay without knowing what kind of case to prepare for. Under the parties' proposed  
24 modified schedule, the final cutoff dates for fact and expert discovery, as well cutoff  
25 dates for dispositive motions, would be triggered by the Court's ruling on class  
26 certification. The parties propose four months to complete all fact and expert discovery  
27 on the merits of the claims and on remedies.

1       **C.     Joint Proposed Modified Scheduling Order**

2       The parties jointly propose a modified scheduling order, which is attached as  
3 Exhibit 1. For ease of reference, the Court's June 19, 2015 Scheduling Order is attached  
4 as Exhibit 2.

5       **II.     ARGUMENT**

6       A trial court has discretion to modify its own scheduling order upon a showing of  
7 good cause. *Izaguirre v. Greenwood Motor Lines, Inc.*, 523 Fed. Appx. 482, 483 (9<sup>th</sup> Cir.  
8 2103). The Court's focus in considering a motion, or joint motion, to amend a  
9 scheduling order is on the parties' diligence in litigating the case. *Johnson v. Mammoth*  
10 *Recreation, Inc.*, 975 F.2d 604, 609 (9<sup>th</sup> Cir. 1992); *Villone v. United Parcel Servs., Inc.*,  
11 Case No. CV-09-8213-PHX, 2011 WL 320907 (D. AZ. Jan 31, 2011), at \*2 ("good cause  
12 standard primarily considers the diligence of the party seeking the amendment).

13       Here, the parties have been diligently working to meet the Court's current  
14 scheduling order. To that end, all parties have served their initial disclosures, and all  
15 parties timely served their initial sets of discovery directed to the safe harbor summary  
16 judgment motion. The parties are well on track to meet all the deadlines the Court  
17 imposed in order to tee up that early summary judgment motion.

18       The reason for this motion is to address events that may come after summary  
19 judgment, but whose timing is not entirely within the parties' control. The parties do  
20 not control when they will get a hearing date for the summary judgment motion, and the  
21 parties do not control when that motion will be ruled upon. Based upon the current  
22 schedule, it is entirely possible that Plaintiffs' motion for class certification would have  
23 to be filed before the Court rules upon Defendant's summary judgment motion. The goal  
24 of this proposed amendment is to allow all sides to marshal resources as appropriate, but  
25 tailor their efforts to actual developments in the case, not just calendar dates.

26       Another consideration for the Court in determining whether to amend a scheduling  
27 order is whether one side is prejudiced either by the amendment or by any delay in  
28 seeking amendment. *Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 157 (N.D. Cal.

2005). Here, the parties are jointly seeking the amendment, so there is no claim of prejudice to or by either side. There is no delay involved because the parties are raising the issue early on, and are only seeking to address what might happen after they comply with the Court's initial scheduling order and present the safe harbor summary judgment motion. Thus, no side is seeking to delay or even slow down the case by virtue of anything within that party's control.

Finally, the modified schedule proposed by the parties *should not delay* the October 31, 2016 trial date in the current Scheduling Order. The proposed modifications merely shuffle the order of some proceedings and cutoff dates to permit the matter to move forward in a cost-efficient manner, while still meeting the Court's outside date for getting the case to trial. In bringing this Joint Motion, the parties re-affirm their commitment to move the case along properly and to get it to trial on schedule.

### III. CONCLUSION

For the forgoing reasons, the parties jointly request that the Court modify the Scheduling Order as Provided in Exhibit 1.

DATED: July 16, 2015

Respectfully submitted,  
GREENBERG TRAURIG, LLP

By: /s/ Ricky L. Shackelford  
Ricky L. Shackelford  
Matthew R. Gershman  
Attorneys for Defendant  
Fifth Generation, Inc., d.b.a.  
Tito's Handmade Vodka  
E-mail: *shackelfordr@gtlaw.com*  
*gershmanm@gtlaw.com*

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3 Dated: July 16, 2015

DEL MAR LAW GROUP, LLP

4  
5 By: /s John H. Donboli  
6 JOHN H. DONBOLI  
7 DEL MAR LAW GROUP, LLP  
8 Attorney for Plaintiff GARY  
9 HOFMANN and all others similarly  
10 situated

CUNEO GILBERT & LaDUCA, LLP

11  
12 By: /s Jonathan W. Cuneo  
13 JONATHAN W. CUNEO  
14 TAYLOR ASEN  
15 Attorneys for Plaintiff GARY  
16 HOFMANN and all others similarly  
17 situated  
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**CERTIFICATE OF SERVICE****UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA*****Hofmann v. Fifth Generation, Inc., etc.***  
***USDC Case No. 3:14-CV-2569-JM-JLB***

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address is **1840 Century Park East, Suite 1900, Los Angeles, CA 90067.**

On July 16, 2015, I served the **JOINT MOTION TO AMEND SCHEDULING ORDER; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

JOHN H. DONBOLI (SBN: 205218) E-mail: <a href="mailto:jdonboli@delmarlawgroup.com">jdonboli@delmarlawgroup.com</a> JL SEAN SLATTERY (SBN: 210965) E-mail: <a href="mailto:sslattery@delmarlawgroup.com">sslattery@delmarlawgroup.com</a> DEL MAR LAW GROUP, LLP 12250 El Camino Real, Suite 120 San Diego, CA 92130 Telephone: (858) 793-6244 Facsimile: (858) 793-6005  <b><i>Attorneys for Plaintiff: GARY HOFMANN, an individual and on behalf of all others similarly situated</i></b>	Jonathan W. Cuneo, Esq. Email: <a href="mailto:jonc@cuneolaw.com">jonc@cuneolaw.com</a> Taylor Asen, Esq. Email: <a href="mailto:tasen@cuneolaw.com">tasen@cuneolaw.com</a> <b>CUNEO GILBERT &amp; LaDUCA, LLP</b> 507 C Street, NE Washington, DC 20002 Tel: (202) 789-3960 Fax: (202) 789-1813  <b><i>Co-Counsel for Plaintiff: GARY HOFMANN, an individual and on behalf of all others similarly situated</i></b>
Michelle C. Doolin, Esq. Email: <a href="mailto:doolinmc@cooley.com">doolinmc@cooley.com</a> Darcie A. Tilly, Esq. Email: <a href="mailto:dtilly@cooley.com">dtilly@cooley.com</a> <b>COOLEY LLP</b> 4401 Eastgate Mall San Diego, CA 92121 Tel: (858) 550-6000 Fax: (858) 550-6420  <b><i>Attorneys for Defendant: FIFTH GENERATION, INC.</i></b>	



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Case No.: 14-cv-2569 JM (JLB)



1 who are registered CM/ECF users will be served by the CM/ECF system.  
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mail or by other means permitted by the court rules.

3 ☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and  
4 correct, and that I am employed at the office of a member of  
the bar of this Court at whose direction the service was made.

5 Executed on July 16, 2015, at Los Angeles, California.

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8 /s/ Ricky L. Shackelford  
Ricky L. Shackelford  
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